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7 **Attorneys for Defendant INDEMNITY INSURANCE
COMPANY OF NORTH AMERICA**

8
9 **UNITED STATES DISTRICT COURT**

10 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

11
12 THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

13 Plaintiff,

14 vs.

15 INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA, DOES 1 TO 20,

16 Defendant.

17 Case No. C 07-2721 PJH

18 **DEFENDANT INDEMNITY INSURANCE
COMPANY OF NORTH AMERICA'S
OPPOSITION TO PLAINTIFF'S MOTION
FOR ATTORNEYS' FEES AND COSTS;
DECLARATION OF PAULA G. TRIPP
AND EXHIBIT IN SUPPORT THEREOF**

19 DATE: September 26, 2007

TIME: 9:00 a.m.

CRTRM.: 3

20 Trial Date: None

Defendant INDEMNITY INSURANCE COMPANY OF NORTH AMERICA

21 ("INDEMNITY") hereby files its opposition to THE REGENTS OF THE UNIVERSITY OF
22 CALIFORNIA'S (The "REGENTS") Motion for Attorneys' Fees and Costs Incurred in Connection
23 with Removal [28 U.S.C. §1447(c)] on the grounds that such an award would not be just because
24 (1) INDEMNITY had objectionably reasonable grounds to believe that removal was proper and
25 (2) the request by The REGENTS for an award of costs and fees in the amount of \$5,155.50 is
26 excessive.

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1 I. **NO AWARD OF ATTORNEYS' FEES AND COSTS SHOULD BE GRANTED TO**
 2 **PLAINTIFF BECAUSE INDEMNITY HAD OBJECTIONABLY REASONABLE**
 3 **GROUNDS TO BELIEVE THAT REMOVAL WAS PROPER.**

4 28 U.S.C. § 1447 (c) states "an order remanding a case *may* require payment of just costs
 5 and any actual expenses, including attorneys fees, incurred as a result of the removal." (Emphasis
 6 added.) Thus, an award of attorneys' fees and costs pursuant to this statute is not mandatory. The
 7 Supreme Court has held that the granting of the award turns on the reasonableness of the removal.
 8 *Martin v. Franklin Capital Corporation* (2005) 546 U.S. 132, 141. In the *Martin* case, the
 9 Supreme Court stated "absent unusual circumstances, a court will not impose an award of
 10 attorneys' fees and expenses upon the removing party where that party had objectively reasonable
 11 grounds to believe that removal was legally proper." *Id.*

12 Thus, the application of § 1447(c) requires consideration of the propriety of the removing
 13 party's actions based on an objective view of the legal and factual elements in each particular case.
 14 The question of whether or not to award costs and fees lies within the sound discretion of the trial
 15 judge who may take into account the particular circumstances of the case and the legal issues
 16 involved." *Schrader v. Hamilton* (C.D. Cal. 1997) 959 F. Supp. 1205, 1212. The court should
 17 evaluate the objective merits of removal at the time of removal, irrespective of the fact that it
 18 might ultimately be determined that removal was improper. "The propriety of the defendant's
 19 removal continues to be central in determining whether to impose fees." *Miranti v. Leei* (5th Cir.
 20 1993) 3 F.3d 925, 928; *see also Daleske v. Fairfield Communities, Inc.* (10th Cir. 1994) 17 F.3d
 21 321 (declining to award fees on conclusion that defendant had legitimate basis for believing
 22 district court had jurisdiction); *Schmitt v. Ins. Co. of N.Am.* (9th Cir. 1988) 845 F.2d 1546, 1552
 23 (holding fees to be inappropriate where removal was "fairly supportable"); *Morgan Guar. Trust*
 24 *Co. of N.Y. v. Palau* (1992) 971 F.2d 917, 923 (awarding fees only after finding fault with
 25 defendant's tactics).

26 In the present matter, although ultimately unsuccessful, INDEMNITY's removal based on
 27 diversity jurisdiction had an objectionably reasonable basis. As noted by INDEMNITY in its
 28 notice of removal and opposition papers to the motion to remand, INDEMNITY removed this case

1 to the Northern District based on its argument that The REGENTS was a citizen of the state of
 2 California, and not an arm of the state. In support of its argument, INDEMNITY analyzed and
 3 cited to case law which indicated that The REGENTS could not assert its status as an arm of the
 4 State of California to defeat diversity jurisdiction where The REGENTS had voluntarily chosen to
 5 prosecute a claim as a plaintiff state.

6 The courts have held that the essential test to determine whether a state agency or
 7 governmental body constitutes a "citizen" of a state for diversity purposes is the same test that
 8 applies in 11th amendment challenges to the maintenance of suit against state agencies. (See
 9 *University of South Alabama v. American Tobacco Co.* (11th Cir. 1999) 168 F.3d 405, 412.) In the
 10 case of *California ex rel Lockyer v. Dynegy, Inc.* (2004) 375 F.3d 831, which is cited to and
 11 analyzed in INDEMNITY's opposition, the court held that the protections of the Eleventh
 12 Amendment do not apply to a state that voluntarily brings suit as a plaintiff in state court. (*Id.* at
 13 848.) The *Dynegy* court noted, it is long settled...that although a state may not be sued without its
 14 consent, the protections of the Eleventh Amendment are privileges which may be waived. (See
 15 *Id.*) Based on this reasoning, INDEMNITY asserted that The REGENTS could not assert its
 16 status as an arm of the state of California to defeat diversity jurisdiction when it voluntarily and
 17 consciously prosecuted an action against INDEMNITY. Clearly the cases cited by INDEMNITY
 18 implied that a plaintiff state should be treated differently when asserting jurisdictional challenges,
 19 and thus, INDEMNITY made a reasonable argument as to why The REGENTS could not defeat
 20 diversity jurisdiction in this instance. For these reasons, an award of attorneys' fees and expenses
 21 in this matter would not be just.

22 Moreover, The REGENTS can hardly argue that INDEMNITY lacked an objectively
 23 reasonable basis for removal, and in the same breath argue that its counsel reasonably required 24
 24 attorney hours to prepare and argue its motion for remand. Had INDEMNITY truly had no
 25 reasonable ground for seeking removal, then The REGENTS' counsel would not have spent almost
 26 three days of attorney time preparing the motion to remand.

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1 **II. THE REGENTS' REQUEST FOR ATTORNEYS FEES AND EXPENSES IN THE**
 2 **AMOUNT OF \$5,155.50 IS EXCESSIVE AND SHOULD BE DENIED.**

3 In the event this Court finds that INDEMNITY's basis for removal was not objectionably
 4 reasonable and that an award of attorneys' fees and expenses is just pursuant to the circumstances
 5 of the case, INDEMNITY nonetheless asserts that The REGENTS' request of \$5,155.50 is
 6 excessive and that an award of the full amount requested would not be just. The REGENTS'
 7 simply cannot justify spending 24 hours on the motion to remand when counsel for The
 8 REGENTS' forwarded a previously drafted version of the remand motion to INDEMNITY'S
 9 counsel while the parties were still in negotiations regarding venue and jurisdiction. (See
 10 declaration of Paula G. Tripp, ¶ 3.) This amount of time is simply excessive on its face and
 11 therefore should be reduced to a more reasonable number. The courts have made it clear that
 12 §1447(c) is not a sanctions rule. *Tenner v. Zurek* (7th Cir. 1999) 168 F.3d 328, 329-30. A
 13 prevailing party is simply entitled to just costs.

14 Additionally, The REGENTS are clearly not entitled to \$1,681.50 for work done in
 15 opposition to INDEMNITY'S motion to transfer. The REGENTS claims that the motion to
 16 transfer "would not have been filed but for being in federal court" and, therefore, its costs are a
 17 "result" of the removal. This statement is simply not supported by the evidence. In fact,
 18 INDEMNITY currently has reserved a hearing date in the County of Alameda for its motion to
 19 transfer, which is set to be heard October 29, 2007. (Tripp declaration, ¶ 5.)

20 Moreover, had The REGENTS been reasonable, all attorneys' fees and costs incurred in
 21 connection with the motion to remand and transfer venue could have been avoided. Prior to filing
 22 the motion, although INDEMNITY believed it had a strong basis to oppose the motion to remand,
 23 it realized there was a possibility the motion to remand would be granted and, therefore, suggested
 24 to The REGENTS' counsel that perhaps the best solution would be for the parties to compromise,
 25 i.e., INDEMNITY would agree this action could remain in state court if The REGENTS agreed
 26 the venue would be Orange County. The REGENTS refused this offer, thereby requiring
 27 INDEMNITY to oppose the motion to remand and proceed with its motion to transfer venue.
 28 While The REGENTS certainly had the right to refuse INDEMNITY's proposed compromise, it

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1 would still have had to oppose the motion to transfer in state court and could have avoided the law
 2 and motion expense completely. It is simply unjust to allow The REGENTS to be rewarded for its
 3 unwillingness to compromise when the action will still likely be transferred to Orange County.

4 **III. CONCLUSION**

5 Based on the foregoing, it would not be just, pursuant to 28 U.S.C. § 1447(c), to award The
 6 REGENTS attorneys' fees and expenses when INDEMNITY had an objectionably reasonable
 7 basis for removal. Accordingly, INDEMNITY respectfully requests that the instant motion be
 8 denied. In the alternative, in the event the Court is inclined to order that some amount be paid to
 9 The REGENTS, INDEMNITY respectfully requests that the Court reduce the award to an amount
 10 that is reflective of a reasonable amount of time relating solely to the motion to remand.

11 INDEMNITY contends that no more than ten hours is reasonable.

12

13 DATED: September 5, 2007

ANDERSON, McPHARLIN & CONNERS LLP

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15 By: /s/ Rosa Martinez-Genzon

16 Michael C. Phillips APC

17 Paula G. Tripp

18 Rosa Martinez-Genzon

19 Attorneys for Defendant INDEMNITY INSURANCE
 20 COMPANY OF NORTH AMERICA

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DECLARATION OF PAULA G. TRIPP

I, Paula G. Tripp, hereby declare as follows:

1. I am an attorney-at-law duly licensed to practice before all courts in the State of California and am a partner with the law firm of Anderson, McPharlin & Conners LLP, attorneys of record for defendant INDEMNITY INSURANCE COMPANY OF NORTH AMERICAN ("INDEMNITY") in the above-entitled action.

7 2. I have personal knowledge of the matters set forth herein, and if called upon as a
8 witness to testify thereto, I could and would competently do so.

9 3. On June 22, 2007, Michael O'Bresly, attorney for The REGENTS, sent a draft
10 motion for remand asking us to consider stipulating to the remand of this case. A true and correct
11 copy of Mr. O'Bresly's letter to our firm is attached hereto as **Exhibit A**.

12 4. After receiving Mr. O'Bresly's draft of the motion to remand and after having
13 researched the authorities he provided in addition to others we located in support of this court
14 having jurisdiction, I discussed the matter with my client to determine whether we would stipulate
15 to the case being remanded to state court. Although I believed we had a strong argument to make
16 that the authorities cited by The REGENTS were not persuasive because they all involved cases
17 where the "state agency" was a defendant, not a plaintiff as The REGENTS is in this action, I still
18 understood that there was a risk that the case would be remanded. As a result of the potential risk
19 and knowing that we believed the proper venue for this case was Orange County, not Alameda
20 County, I proposed a compromise that INDEMNITY would agree to the remand if The REGENTS
21 agreed that the action could be transferred to Orange County. I was informed by Mr. O'Bresly
22 during the week of July 9th that his client would not so stipulate and he proceeded with filing his
23 motion to remand.

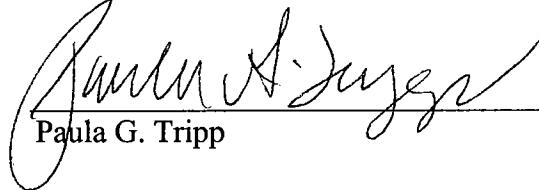
24 5. Regardless of the fact that this action has now been remanded, we still contend that
25 the proper venue for this action is in Orange County. Accordingly, INDEMNITY currently has
26 reserved a hearing date in the County of Alameda for its motion to transfer, which motion is set to
27 be heard on October 29, 2007 in Department 19.

28 I declare under penalty of perjury under the laws of the State of California and the United

1 States that the foregoing is true and correct. Executed this 5th day of September 2007, at Los
2 Angeles, California.

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Paula G. Tripp



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EXHIBIT A

Michael P. O'Bresly
LAW OFFICE OF MICHAEL P. O'BRESLY

1300 Clay Street 11th Floor
P. O. Box 72351
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Also Admitted in Nevada

June 22, 2007

Via Facsimile

Michael C. Phillips
Anderson, McPharlin & Conners LLP
444 South Flower Street, Thirty-First Floor
Los Angeles CA 90071-2901

Re: Regents of the Univ. of Ca. v. Ins. Indemnity Company of No. America

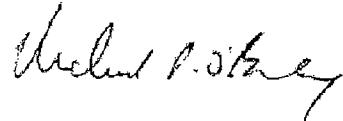
Dear Mr. Phillips:

The Regents request that Indemnity Insurance Company stipulate to a remand to state court, on the grounds that the United States District Court lacks subject matter jurisdiction over this case. The Regents is not a "citizen" of the State of California for purposes of the diversity jurisdiction statute. Rather, the Regents is an arm of the State of California, as has been held in numerous federal decisions. A state is not a "citizen" for purposes of the diversity statute. Attached to this letter is a rough outline of a motion to remand which lays out the essential analysis for your consideration.

If you wish to have a remand motion go forward, I request that you agree to continue the hearing on your motion to transfer venue, so that both the motion to remand and the motion to transfer venue can be heard at the same time.

Also please note my new mailing address, above, for your records. Phone, fax and email are unchanged.

Very truly yours



MICHAEL P. O'BRESLY

DIVERSITY JURISDICTION DOES NOT EXIST BECAUSE THE REGENTS OF THE UNIVERSITY OF CALIFORNIA IS NOT A "CITIZEN" OF THE STATE OF CALIFORNIA. THE CASE SHOULD BE REMANDED TO STATE COURT.

Indemnity Insurance Company removed this action to federal court from the California Superior Court on the basis of diversity jurisdiction. Diversity jurisdiction is conferred by 28 U.S.C. §1332, which provides, in relevant part, "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of \$75,000, and is between: *citizens* of different states"

The party invoking diversity jurisdiction must establish sufficient facts to warrant its exercise. *Gibbs v. Buck*, 307 U.S. 66, 69; *Bank One, Texas N.A. v. Montle*, 964 F.2d 48, 50 (1st Cir. 1992). Section 1332 is strictly construed against removal. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). When lack of subject matter jurisdiction is raised in diversity cases, the burden of proving all jurisdictional facts rests on the party seeking jurisdiction. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857-58 (9th Cir. 2001). Moreover, when a state case has been removed to federal court and diversity jurisdiction is challenged, all doubts should be resolved in favor of remand to the state court. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992); *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1092 (9th Cir. 1983).

Defendant Indemnity Insurance Company improperly removed the matter by simply presuming that the Regents was a California citizen for purposes of the diversity jurisdiction statute, 28 U.S. C. §1332. In fact, the Regents is not a "citizen" of the State of California – the Regents *is* the State of California. As such, the requirements of diversity jurisdiction are not met and this Court lacks the power to adjudicate this matter.

The United Supreme Court has recognized that a state itself is not a “citizen” of a state so as to confer diversity jurisdiction. Moreover, if a state agency or governmental body is an “arm of the state,” then the state agency is also not a “citizen.” *Moor v. County of Alameda*, 411 U.S. 693, 717-21 (1973), *overruled on other grounds*, *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 696 n. 61 (1978); *see also Morongo Band of Mission Indians v. California State Board of Equalization*, 858 F.2d 1376, 1381 (9th Cir. 1988).

The essential test of whether a state agency or governmental body constitutes a “citizen” of a state for diversity purposes is the same test applied in 11th Amendment challenges to the maintenance of suits against state agencies or bodies in federal court. *American Tobacco*, 168 F.3d at 412; *see also PYCA Industries, Inc. v. Harrison County Waste Water Management Dist.* 81 F.3d 1412, 1417 fn. 2 (5th Cir. 1996); *Tradigrain, Inc. v. Mississippi State Port Authority*, 701 F.2d 1131, 1132 (5th Cir. 1983) (“the analysis of an agency’s status is virtually identical whether the case involves determination of immunity under the Eleventh Amendment or a determination of citizenship for diversity jurisdiction”). In *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 412 (11th Cir. 1999), the Eleventh Circuit held that the University of South Alabama was an “alter ego” of the state which was not subject to diversity jurisdiction, expressly finding that the applicable test of whether an agency is an “alter ego” of a state for diversity purposes is the same essential test of whether a governmental body is an alter ego of the state for 11th Amendment purposes. Thus, the analysis of whether the Regents of the University of California may invoke 11th Amendment protections afforded to states is the same inquiry as presented on the question of whether the Regents is the equivalent

of the state rather than a “citizen” of the state for purposes of jurisdiction under 28 U.S.C. §1332.

That inquiry has been made and has been unequivocally answered in the affirmative. In its 1997 decision in *Regents of the University of California v. Doe*, 519 U.S. 425, 429 (1997), the United States Supreme Court expressly held that the Regents of the University of California is an “arm of the state” for 11th Amendment purposes. The lower courts in the districts of California have similarly held in numerous published decisions that the University of California constitutes an “arm of the state” or an “alter ego” of the State of California for 11th Amendment purposes. *Vaughn v. Regents of the University of California*, 504 F. Supp. 1349, 1353 n.5 (E.D. Cal. 1981); *see also Competitive Technologies v. Fujitsu Ltd.*, 286 F. Supp. 2d 1118, 1133 (N.D. Cal. 2003).

On balance, the court remains of the opinion that the three factors discussed supra tip the scale in favor of a finding that the State of California is the real party in interest in the case sub judice. The court thus concludes that the Regents and the individual defendants sued in their official capacities are entitled to invoke the Eleventh Amendment immunity.

Vaughn, 504 F. Supp. at 1354 (approving *Selman v. Harvard Medical School*, 494 F. Supp. 603, 615-16 (S.D.N.Y. 1980) (Regents is an agency of the State of California entitled to invoke Eleventh Amendment immunity); *see also Stones v. Los Angeles Community College Dist.*, 572 F. Supp. 1072, 1976-78 (C.D. Cal. 1983) (California Constitution creates state university and educational system, and education of the public is a non-delegable state duty)).

These decisions compel the conclusion that Regents is not a “citizen” for purposes of the diversity statute. This case was improperly removed to federal court on the basis

of diversity jurisdiction. Lacking jurisdiction over this matter, this court should unquestionably remand the matter to the Superior Court of California for adjudication.